

1 . UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 - - - - - X 21-CV-0283
4 MARTIN GUGINO,
5 Plaintiff

6 Vs. Buffalo, New York
7 CITY OF BUFFALO, ET AL, February 14, 2023
8 Defendant
9 - - - - - X

10 TRANSCRIPT OF ORAL ARGUMENT
11 BEFORE THE HONORABLE LESLIE G. FOSCHIO
12 UNITED STATES DISTRICT JUDGE

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1 THE CLERK: All rise. You may be seated.
2 On the record Gugino versus the City of Buffalo
3 21-CV-283. We're here on oral argument for
4 plaintiff's motion to compel and defendant's motion
5 for a protective order. Counsel, please state your
6 name and who you represent.

7 MR. WEISBECK: Richard Weisbeck representing
8 Martin Gugino.

9 MS. WISCHERATH: Good afternoon. Melissa
10 Wischerath representing plaintiff Martin Gugino.

11 MR. RUSS: Good afternoon, Your Honor. Hugh
12 Russ from Hodgson Russ. We represent the defendants.

13 THE COURT: Well, um interesting motions,
14 um, but we'll take Mr. Weisbeck and Ms. Wischerath's
15 motion first.

16 MR. WEISBECK: Thank you, Your Honor.

17 THE COURT: You can be seated.

18 MR. WEISBECK: Well, thank you, Your Honor.
19 Um, Your Honor, um, this is a pretty simple motion.
20 It's our position that the defendant violated Rule 30
21 of the Federal Rules of Civil Procedure objecting to
22 the use of one word in a question which is of garden
23 variety form objection and on the record claiming that
24 it was argumentative, improper and clearly improper.
25 And it's clear that these arguments do not meet the

1 requirements set forth in Rule 30 for directing a
2 party not to answer a deposition question. Um.

3 THE COURT: Nor in my guidelines.

4 MR. WEISBECK: I'm sorry?

5 THE COURT: Nor in my guidelines.

6 MR. WEISBECK: Yes, Your Honor. Absolutely.
7 Now, um, there's been a lot of statements made in the
8 defendant's opposing papers about my motives and my
9 questioning of this witness, and I can address that at
10 this time as well, Your Honor.

11 THE COURT: Um.

12 MR. WEISBECK: If the Court pleases or do
13 you want me to wait until the defendants advance their
14 arguments?

15 THE COURT: Sure.

16 MR. WEISBECK: Wait?

17 THE COURT: Yeah.

18 MR. WEISBECK: Okay. So at least that with
19 respect for our motion, Judge, it's a pretty simple
20 motion on a garden variety, um, form objection, and as
21 I put in my moving papers, if an attorney for a party
22 can act as the gate keeper dictating what words
23 another attorney can use or select for um his or her
24 questioning of a witness or a party, then you know,
25 that disrupts the entire deposition, and as I said

1 both at the time of this um -- this dispute and in my
2 papers, if I have a question that's in an improper
3 form and I don't correct it, it's my risk because at
4 trial if the Court sustains that objection, I won't be
5 able to use that question and answer at trial. So
6 that's my risk, and so I don't even see why we should
7 have to be here when there's an objection to one word
8 in a question.

9 THE COURT: Okay. Thank you. Um, Mr. Russ?

10 MR. RUSS: Thank you, Your Honor. Let me
11 say a couple of things first. As you know from our
12 cross motion, um, and my declaration in support of it,
13 this wasn't one blatantly improper question, although
14 the question was blatantly improper. This was part of
15 a series of questions designed to um harass the
16 witness, and um for most of them, I did object to the
17 form and allowed the witness to answer, but it was
18 going too far and that's why I stopped the process.

19 I am aware of the federal rules. I'm aware
20 of what I've called the Foschio rules, and only under
21 very extreme circumstances is a lawyer allowed to
22 direct a witness not to answer, and Rule 30 supplies
23 the rules -- or the guidelines for that determination,
24 and um, I would simply say that the Magistrate Judge
25 Payson opinion um which we've cited in our papers

1 really I think captures the spirit of the rules and
2 even the Foschio guidelines.

3 Depositions are to be conducted in a manner
4 that simulates the dignified and serious atmosphere of
5 the courtroom, and conduct that is not permissible in
6 the courtroom during the questioning of a witness is
7 ordinarily not permissible at a deposition. The
8 specific question never would be permitted at trial,
9 Your Honor, and many of the questions that preceded it
10 would not be either.

11 THE COURT: Well, doesn't -- doesn't that
12 argument reinforce the position of the plaintiff? In
13 other words, if an objection to form is an objection
14 to form, and if it's not stated, then it's waived and
15 the issue becomes admissibility at trial. It doesn't
16 -- as I understand the way the Rule 30 works, it
17 doesn't authorize the defending attorney to interrupt
18 the proceeding, the deposition, and to instruct the
19 witness not to answer.

20 MR. RUSS: I must respectfully disagree,
21 Your Honor. Rule 30 um allows a witness or the
22 proponent of a witness to um interrupt the deposition
23 when the questioning is designed to unreasonably
24 annoy, embarrass or oppress the deponent and that's
25 what was happening there.

1 THE COURT: Yeah, but you did -- as I read
2 your statements in the -- in the record of the
3 deposition and up to the point at which Mr. Um
4 Weisbeck um queried the witness about the photograph
5 and asked whether there was an assault -- asked the
6 witness to identify the officer who committed that
7 assault upon the citizen peacefully demonstrating
8 against the police violence -- against police
9 violence, your -- nothing in your behavior at the
10 deposition suggested that there was any annoyance or
11 undue pressure on the -- on the witness. Did I miss
12 something?

13 MR. RUSS: Did I object on that basis?

14 THE COURT: Yes.

15 MR. RUSS: Is that what you are saying?

16 THE COURT: No.

17 MR. RUSS: No. I objected that the question
18 was blatantly improper.

19 THE COURT: No. You objected on the grounds
20 that -- you didn't use the word blatantly. You used
21 the word form which was correct. I mean, I saw
22 several instances of leading questions. For example,
23 on Page 22 Lines 10 to 11 Mr. Weisbeck asked the
24 witness, So you didn't get the memo that the mayor
25 disbanded the ERT? That's a leading question, and you

1 objected, but not based on the leading character of
2 the -- of the question. Compound questions, what was
3 the purpose of the line? And how does that intersect
4 with what you just said for instance the curfew or in
5 other instances to arrest instigators. Clearly a
6 compound question and you objected to that as well, I
7 think.

8 Um, page 25. Let me just see here. 25 at
9 Lines 22, um, Page 26. How does this intersect with
10 the -- and you objected to form and you said you may
11 answer. So I think that's the point, that your -- the
12 basis for your series of objections up to the point of
13 which we are talking about in the -- with regard to
14 identity of the officer who was allegedly assaulting
15 according to Mr. Weisbeck the citizen seems to me to
16 underscore that you had no problem with the -- with
17 the idea of -- of overbearing conduct by Mr. Weisbeck
18 but rather you were objecting as to form.

19 So I don't understand why you interpret a
20 series of form objections -- questions that obviously
21 I think everybody agrees, probably Mr. Weisbeck
22 agrees, I'm not asking him to comment about it, that
23 they were objectionable as to form and he didn't
24 attempt to rephrase. So he's, perhaps that's up to
25 the district judge at trial, lost the opportunity to

1 use the response for any purpose at the trial that
2 Rule 30 allows.

3 Um, so I'm -- I'm not understanding. You're
4 leaping from objections as to form to overreaching
5 conduct which triggers a right to ask for a
6 termination of the deposition, and you didn't ask for
7 that anyway. You -- your papers talk about um issues
8 of relevancy, the question is not designed to obtain
9 relevant evidence. That's not the law. There's no
10 objection -- there's no right to forbid a witness from
11 answering a question that seeks irrelevant
12 information; is there?

13 MR. RUSS: If that were the only problem
14 with the question --

15 THE COURT: Well, the only --

16 MR. RUSS: No.

17 THE COURT: Go ahead.

18 MR. RUSS: I have two answers for you, Your
19 Honor. First the short one then the longer one. The
20 short one is I did in fact object that the specific
21 question was, this is on Page 40, argumentative,
22 improper and blatantly improper. The longer answer,
23 Your Honor, is that Rule 30 contemplates not only the
24 admissibility of evidence at trial but also the
25 treatment of the witness being deposed, and my

1 objection and my subsequent motion under Rule 30 is to
2 the way the witness was being treated, and that the
3 questions were escalating in impropriety, and it was
4 an obvious attempt to cause my witness to lose his
5 temper on a video camera.

6 THE COURT: Did he lose his temper?

7 MR. RUSS: He did not. Only his lawyer did,
8 Your Honor.

9 THE COURT: Well, that's unfortunate, but
10 that's not a grounds for a protective order.

11 MR. RUSS: To harassing um -- excuse me --
12 annoying, embarrassing or oppressing the deponent?

13 THE COURT: You honestly think that all the
14 questions he was asking about the military background
15 of the witness and his tattoos were annoying,
16 embarrassing or oppressive?

17 MR. RUSS: Asking him, for example, if he
18 was trained to kill citizens, asking him if he was
19 trained to kill and shoot guns?

20 THE COURT: Did you object on that ground?

21 MR. RUSS: I did.

22 THE COURT: Did you object on that ground?

23 MR. RUSS: I did.

24 THE COURT: You did? Well, show me in the
25 record where you did that.

1 MR. RUSS: Every one of them I objected to
2 the form of the question and allowed --

3 THE COURT: Yeah, to the form, but not to
4 the basis -- not on the grounds that it was
5 oppressive, annoying, unreasonably annoying,
6 unreasonably embarrassing or oppressive. You didn't
7 object on that basis.

8 MR. RUSS: I did not quote that language,
9 Your Honor.

10 THE COURT: Well, that's --

11 MR. RUSS: But if the magic language is the
12 appropriate basis for an objection then --

13 THE COURT: Well, it certainly is in the
14 question -- in the context of a challenge to a
15 deposition question. I mean, your --

16 MR. RUSS: So --

17 THE COURT: The law is that relevancy is not
18 a basis to object to a question. Relevancy is always
19 preserved.

20 MR. RUSS: I understand that.

21 THE COURT: Harassment -- harassment if
22 your -- nobody seems to be aware of Judge Gorenstein's
23 decision in 2012 in Severstal Wheeling Inc. Versus WPN
24 Corporation. That's S-E-V-E-R-S-T-A-L Wheeling Inc.
25 Versus WPN Corporation 2012 West Law 1982132 at Star 2

1 where um Judge Gorenstein rejects the idea that a
2 ground for instructing a witness not to answer is that
3 the questions were plainly irrelevant and designed to
4 harass the witness.

5 I mean, what could be clearer, and there is
6 case law elsewhere I unfortunately didn't bring my --
7 my handy dandy handbook. Did you bring it? No. I
8 left it up in the office unfortunately, wherein the
9 Baker McKee authors of the Federal Rules Handbook cite
10 to other jurisdictions for the proposition that a
11 question that is intended to harass the witness is not
12 a grounds to direct the witness not to answer. The
13 Rule 30 makes crystal clear that the only grounds to
14 do that are to preserve a privilege or to enforce a
15 limitation that the Court has previously imposed.
16 Isn't that the law, Mr. --

17 MR. RUSS: That's part of the law, Your
18 Honor.

19 THE COURT: Well, what's the other part that
20 I'm missing here?

21 MR. RUSS: That a deposition -- this is Rule
22 30D3A, at any time during a deposition the deponent or
23 a party may move to terminate or limit it on the
24 ground that it is being conducted in bad faith.

25 THE COURT: Yup. I --

1 MR. RUSS: Or in a manner that unreasonably
2 annoys, embarrasses or oppresses the deponent or
3 party.

4 THE COURT: But you didn't -- but
5 interestingly, with great respect for learned counsel
6 stature in the legal community, but you did not at the
7 deposition say that you were terminating the
8 deposition to seek a motion for -- on that basis. It
9 was Mr. Weisbeck that terminated the deposition in
10 order to get a ruling on the main question and that is
11 what is the -- what types of questions are authorized
12 to permit an opponent to object -- to instruct the
13 witness not to answer, and I'm having difficulty
14 understanding your point.

15 MR. RUSS: I'm not making myself clear, Your
16 Honor. I apologize. First of all, the basis for
17 stopping the deposition was one question. It wasn't a
18 series of questions. It wasn't the process. It was
19 I'm stopping this deposition and the other two that we
20 have scheduled for this week because you won't let me
21 answer one question.

22 The appropriate procedure, Your Honor, I
23 suggest is that the question be marked for later
24 determination by the Court and the deposition proceed
25 on other questions and other subjects. Stopping three

1 depositions for one bad question is not appropriate,
2 Your Honor.

3 THE COURT: Well, um, Mr. Weisbeck felt that
4 he was going to be asking questions like this in
5 other -- for other deponents and felt that there was a
6 need to get clarification. I -- I -- I don't know
7 that there's any case law against it. To the
8 contrary, there's case law that I recall that allows
9 the examining attorney to seek judicial guidance as to
10 the question at hand, namely what is this -- what is
11 the authority for an instruction not to answer, and so
12 I'm at a loss to understand the problem here, Mr.
13 Russ, to be truthful.

14 I read over the transcript. I honestly
15 don't see any overreaching behavior by Mr. Weisbeck.
16 I don't see any unreasonable annoyance. I don't see
17 any embarrassment, um, or oppressiveness in any of the
18 questions that he was promulgating. I don't see it.
19 I'm sorry. And the context in which Judge Payson
20 ruled in her um decision in the -- in the Marset case,
21 that was a pro se litigant that she was sanctioning
22 and going after; right?

23 MR. RUSS: Yes, Your Honor, but just because
24 Mr. Weisbeck's conduct doesn't rise to that level of
25 egregiousness if that's a word doesn't mean it was

1 appropriate or correct.

2 THE COURT: Well, again, the question is
3 whether it's -- rises to the -- or falls to the level
4 of annoyance, embarrassment or oppression, and I don't
5 see any indication of it whatsoever, and nor do I see
6 any basis for finding anything akin to what Judge
7 Payson found in the Marset case which prompted her to
8 sanction the plaintiff, and um, so I don't see the
9 case -- the Marset case as have anything to do with
10 the situation at hand. Um, it's -- it's -- as far as
11 Monell is concerned let's -- all right. So we've
12 talked about the -- the plaintiff's motion. Let's
13 talk about your motion.

14 MR. RUSS: Okay. Your Honor, obviously
15 we've spent a fair amount of time discussing the first
16 ground for the motion. The second ground, Monell,
17 this Court will recall its earlier decision on Monell
18 issues, and this Court ordered that Monell discovery
19 would await um further proceedings. So my argument is
20 relatively simple, Your Honor. This particular
21 question was designed to obtain information concerning
22 other police officers on another date not involving
23 any of the defendants in this case. Um, that's
24 clearly Monell evidence or Monell discovery in so --

25 THE COURT: Why is that?

1 MR. RUSS: Because it's --

2 THE COURT: How does that go to the City's
3 liability?

4 MR. RUSS: It goes to what procedures -- it
5 was going to what procedures were followed, what
6 police officers were doing.

7 THE COURT: But Monell has to do with the
8 municipal liability.

9 MR. RUSS: Right, and it's based upon
10 patterns and practice, based upon procedures on
11 training and instruction, and those are all Monell
12 areas of questioning.

13 THE COURT: Well, it certainly wasn't a
14 ground that you put forth at the deposition; was it?

15 MR. RUSS: Not unless you count my language
16 blatantly improper.

17 THE COURT: Okay. Was that in your mind
18 when you uttered that word blatantly that it was a
19 Monell problem that violated my ruling on limiting the
20 discovery to Monell related issues affecting the
21 city's burden to produce?

22 MR. RUSS: That's a good question, Your
23 Honor, because during the deposition my colleague who
24 was there with me was passing me notes saying he's
25 asking Monell questions. So it was in my mind but --

1 THE COURT: Okay.

2 MR. RUSS: -- no, I can't honestly say that
3 it was the basis for this specific objection.

4 THE COURT: Okay.

5 MR. RUSS: To this specific objection.

6 THE COURT: So your motion is broad enough
7 to include an objection based on -- well, let's see.
8 Well, I guess it's a straight up issue. It doesn't
9 really come within the context of Rule 26C. It comes
10 within the context I guess of just general judicial
11 supervision of discovery and the enforceability of my
12 ruling in your favor on the Monell restriction.

13 MR. RUSS: Yes, Your Honor.

14 THE COURT: So let's --

15 MR. RUSS: Discovery is --

16 THE COURT: Let's hear from the plaintiff
17 about the Monell issue.

18 MR. WEISBECK: Just let me start first.
19 Your Honor, may I just speak for a moment before Ms.
20 Wischerath speaks on this issue?

21 THE COURT: Okay.

22 MR. WEISBECK: Is the Court essentially
23 saying other than what's in my affidavit in opposition
24 to the defendant's motion to get a protective order on
25 my question to these defendants that you don't need to

1 hear anything else or for me to further explain my
2 good faith basis for each one of those questions that
3 I set forth in my affidavit because it's painful to be
4 accused in federal court of acting in bad faith when
5 I'm questioning a defendant in a civil rights claim,
6 and I had a basis for every one of those questions
7 including the tattoos and I explained that in my
8 affidavit.

9 THE COURT: I'll be candid with you. I --
10 lawyer to lawyer, I had a hard time grasping this,
11 where you were heading with those questions and what
12 your purpose was, but I defer to your expertise in the
13 context of this unusual lawsuit.

14 MR. WEISBECK: I appreciate that, Judge.

15 THE COURT: So -- and the federal discovery
16 is liberal to say the least. So far be it from me to
17 second guess your motivations in asking those
18 questions. I'm not sure I really could fathom why you
19 were involved in his tattoos or why you were involved
20 in his military background, but far be it from me to
21 second guess your overall strategy here, Mr. Weisbeck,
22 and I don't think I have any authority to do so.

23 MR. WEISBECK: I appreciate that. Thank
24 you, Your Honor, and it felt difficult even that I
25 felt necessary -- it felt necessary for me to reveal

1 the basis for each of those questions because that is
2 both discovery strategy and trial strategy.

3 THE COURT: Well, that's right.

4 MR. WEISBECK: And because I -- this
5 motion's broad to say that I acted in bad faith with
6 those motions I felt compelled to actually reveal some
7 of my strategy, and that is not something I like to
8 do.

9 THE COURT: Well, I'm not asking you to at
10 this point. So let me just get the -- where do I find
11 your proffered statements for that?

12 MR. WEISBECK: Oh. Well, it's in my
13 affidavit.

14 THE COURT: In your declaration?

15 MR. WEISBECK: Yes, yes.

16 THE COURT: Your attempt to get under his
17 skin so to speak?

18 MR. WEISBECK: Right, and the tattoo
19 questions were -- we have several videos --

20 THE COURT: Yeah.

21 MR. WEISBECK: -- that have um of -- by
22 police officers where only their arms and other
23 people's arms are showing and some people's faces but
24 not the person who is doing the videoing and so --

25 THE COURT: So your purpose was to get

1 identification --

2 MR. WEISBECK: Yes.

3 THE COURT: -- evidence?

4 MR. WEISBECK: Right.

5 THE COURT: And contrary to the defendant's
6 view or interpretation that it was not Monell intended
7 to -- I'm using a shorthand way of describing the
8 issue here which is clumsy on my part. I'm sorry for
9 doing that, but I can't think of a quick way to
10 express it with fewer words. But you were simply
11 focussing on the question at hand and that is in
12 accordance with my ruling that the scope of discovery
13 was limited to the liability of the three primary
14 actors here.

15 MR. WEISBECK: Well, what I -- the tattoos
16 were about identifying people and this particular
17 defendant came in with a jacket and long sleeves, and
18 instead of being intrusive and asking him to take his
19 coat or his jacket off and roll up his sleeves, I
20 asked him just what are your tattoos so I can then
21 compare his description to these videos. It was
22 identification purposes, Your Honor, and I've
23 justified my other questioning as well along those
24 lines, and even the idea that somehow I'm trying to
25 get under someone's skin because I'm conducting a

1 video deposition, video depositions are normal and
2 routine for our office. We do it very frequently.

3 THE COURT: They're normal and routine --

4 MR. WEISBECK: Right.

5 THE COURT: -- throughout the legal
6 profession.

7 MR. WEISBECK: Right, and the defense is
8 making acclain that in advance because I took a video
9 deposition that was a clear signal I'm trying to
10 harass, annoy or embarrass this defendant.

11 THE COURT: I didn't catch that point coming
12 out of the --

13 MR. WEISBECK: That was one of the first
14 paragraphs of the defendant's declaration that I gave
15 a clear signal of my intent to annoy, harass and
16 embarrass.

17 THE COURT: Oh, yes. I see that. I agree
18 with you now, yes.

19 MR. WEISBECK: And um --

20 THE COURT: I'm just rereading Mr. Russ's
21 declaration. Intended to force Officer McCabe to lose
22 his temper. I -- I'm not trying to be little your
23 position, Mr. Russ, at all here, but I found that
24 statement to be above and beyond based on my reading
25 of the record. It seemed to me that -- well, let's

1 go -- let's hear from Ms. Wischerath on the Monell
2 issue.

3 MS. WISCHERATH: Thank you, Judge. Um, so
4 the basis for the bifurcation motion was specific to
5 um discovery requests, and when we first got the
6 motion that issue was raised where I said I don't even
7 understand the scope of what they're seeking to
8 bifurcate, and in response there was a July
9 correspondence that was submitted by Mr. -- I'm going
10 to say his name wrong -- Peter Sahasrabudhe --sorry
11 about that. But Mr. -- counsel for defendants put in
12 a um response that says here's the discovery that
13 we're specifically talking about, Your Honor, and
14 focus the issues on the bifurcation. They all had to
15 do with document demands.

16 THE COURT: That's right. They did.

17 MS. WISCHERATH: And there was never um
18 anything before any of the parties that said, you
19 know, we're also going to take the position that any
20 questions which is from their current motion at 54-4
21 that we should only be able to ask questions at
22 depositions "only to whether or not Martin Gugino
23 actually suffered a constitutional injury on June 4,
24 2020." Again, I don't think that -- I think that's
25 vague. I think it's overly broad. I honestly don't

1 even know what that means in relationship to what
2 questions we're allowed to ask, what questions we're
3 not allowed to ask, if we're --

4 THE COURT: Well, I agree. The order
5 doesn't speak to deposition practice, and here we are
6 now. We're talking about it. Well, can't think of
7 everything I suppose, but um --

8 MS. WISCHERATH: Even in your order, Judge,
9 you identified I think it's the last -- the second to
10 last and the last page, you said because of economy,
11 efficiency, I'm going to -- I think there was a
12 quotation in your order and it um was exhibit -- I
13 believe it was Exhibit B in your papers.

14 THE COURT: Yes.

15 MS. WISCHERATH: If you look at Page 6, you
16 say when you come --

17 THE COURT: Wait a minute. Let me turn to
18 Page 6; okay?

19 MS. WISCHERATH: Yeah. When you come to
20 your conclusion, it's the last sentence there. Um,
21 and you say in turn should plaintiff prevail discovery
22 may proceed without serious risk of loss of evidence
23 as the documents and other records sought by
24 plaintiff's amended first request for production. You
25 don't say -- I mean, and I think of the context of a

1 deposition, obviously memories fade, time. There's
2 different reasons why that would not apply to a
3 deposition. I think that's why the motion was limited
4 to documents, and I believe that it was no surprise to
5 plaintiff or defendant or the Court that that was the
6 basis for the motion to bifurcate. Um.

7 THE COURT: So by contrast in what you are
8 saying is that the -- the order, although it doesn't
9 speak to the D and O, it doesn't speak to the question
10 of a deposition practice, by process of contrast or
11 elimination, it can't reach it. That's your point.

12 MS. WISCHERATH: Yes, Judge.

13 THE COURT: Well --

14 MS. WISCHERATH: I also --

15 THE COURT: What's wrong with that argument,
16 Mr. Russ?

17 MR. RUSS: Your Honor, I agree at the time
18 of the motion you are addressing document discovery.
19 However, the order is about Monell and Monell
20 discovery, and that order becomes operative in all
21 discovery conducted from that moment on. So even
22 though the D and O doesn't specifically say this
23 applies to all the depositions you are going to take,
24 it does.

25 THE COURT: Well, and the question of the --

1 the question regarding the identification of the
2 officers involved in the -- in the encounter with
3 the -- with the non Gugino witness is a Monell related
4 question rather than an individual liability question?

5 MR. RUSS: I believe it is, Your Honor.

6 THE COURT: How?

7 MR. RUSS: Because it's designed to get one
8 witness to comment on the um conduct of another
9 witness. Officer McCabe had already said that he
10 wasn't present that night, that he was on bereavement
11 leave, that he didn't know the officers involved, that
12 he didn't recognize the officers involved, and then
13 the question arose.

14 MR. WEISBECK: May I, Your Honor?

15 THE COURT: So how does that entrench -- how
16 does that trench upon my D and O?

17 MR. RUSS: Because it's asking for
18 procedures and um actions that were conducted prior to
19 the date of Mr. Gugino's incident leading to discovery
20 about previous procedures, previous activities, um,
21 you know, what -- what these officers were instructed
22 on a different day at a different time. Um, that's
23 all Monell, Your Honor.

24 MR. WEISBECK: Judge, just on the particular
25 question and I'll let Ms. Wischerath --

1 THE COURT: Why don't you let Ms. Wischerath
2 handle it.

3 MR. WEISBECK: -- talk about Monell but --

4 THE COURT: She's Ms. Monell here.

5 MR. WEISBECK: Okay. I was just asking the
6 name of the particular police officer that was in the
7 photograph. That was the question.

8 THE COURT: That's right. I agree.

9 MR. WEISBECK: It didn't go to policy or
10 practice or any of that.

11 MS. WISCHERATH: So I think -- I think maybe
12 it's instructive. It was useful to me is that in the
13 context of -- instead of talking about Monell in a
14 vacuum, if we actually look at the Monell claims and
15 how do you separate them from the claims against the
16 individual defendants. I don't see a separation
17 personally. I think these are intertwined
18 specifically because these Monell claims were crafted
19 to piggy back and mirror the individual claims against
20 the defendant.

21 So the first Monell claim which is that
22 Docket 1 and it's Page 33. It's about the curfew.
23 Um, and it's specific to Martin Gugino and it said the
24 curfew violated the constitutionally guaranteed rights
25 of plaintiff Martin Gugino goes on to talk about that.

1 So how -- we have an individual claim for the curfew
2 and then we also have a Monell claim for the curfew.
3 If we're not allowed to ask questions about the
4 curfew, then how do we prove either? I don't know
5 where you --

6 THE COURT: I think I remember. In fact, I
7 thought my D and O alluded to that problem actually.
8 I remember that now that you recall it for my
9 recollection. I recall having that same view of
10 the -- of the issue and I thought I put some language
11 in to that effect, but honestly I didn't think of it
12 before I took the bench, so I'm not able to go in and
13 find it.

14 MS. WISCHERATH: Yeah.

15 THE COURT: But --

16 MS. WISCHERATH: And that's true if you go
17 through each of the four Monell claims. They're
18 intertwined I would say with individual claims against
19 the defendants as well as against the municipality.
20 These aren't, you know, broad practices or policies.
21 These are very specific.

22 THE COURT: Well, you don't have a Monell
23 claim against the individuals.

24 MS. WISCHERATH: That's true. Sorry if I
25 misspoke. But the basis for them is intertwined with

1 the individual defendants. So if you look at --

2 THE COURT: Yeah.

3 MS. WISCHERATH: -- you know, the claim for
4 the curfew, there's the Monell that mirrors that.
5 There's the excessive force Monell which is count two.
6 It says the practice --

7 THE COURT: Well, I think I've heard enough
8 about this Monell issue.

9 MS. WISCHERATH: Okay.

10 THE COURT: I think I know enough about
11 Monell. Certainly, I do, and the -- the scope of my D
12 and O to conclude that the plaintiff has the better
13 part of the argument, Mr. Russ. I -- I think there
14 are issues that Mr. Weisbeck and Ms. Wischerath have
15 identified which not to use a common term but overlap
16 the municipal liability issue, and furthermore, the
17 thrust of the D and O was certainly tied to document
18 production which was the burdensome problem that you
19 pointed out in your request.

20 So I -- at least insofar as this particular
21 problem is concerned is this deposition problem that
22 we're talking about, I don't see that the -- the
23 thrust of the question that triggered our gathering
24 this afternoon trenches heavily upon the limitation
25 created in the D and O with respect to bifurcation of

1 the Monell discovery issues. So I'm not inclined to
2 grant the protective order on that basis, Mr. Russ.

3 MR. RUSS: Thank you, Your Honor.

4 THE COURT: And so anything further with
5 respect to the underlying motions?

6 MR. WEISBECK: Not unless you have
7 questions, Your Honor.

8 THE COURT: Mr. Russ?

9 MR. RUSS: I do have one question if the
10 Court permits.

11 THE COURT: Sure.

12 MR. RUSS: I know the Court isn't in the
13 business of offering advisory opinions, but when we
14 resume these depositions, there will be I'm certain
15 questions that are objectionable. The Court in its
16 comments and questions today seemed to suggest that
17 grounds for objections should be included, and um --

18 THE COURT: Well, only for issue -- only for
19 form.

20 MR. RUSS: So --

21 THE COURT: You're not obliged to object
22 based on relevancy.

23 MR. RUSS: Or any of the other --

24 THE COURT: Well, no. Form is sufficient,
25 but better to say, well, leading or argumentative or

1 compound. In terms of good practice, it seems to me
2 that in fairness you want to give your opponent an
3 opportunity to correct; right?

4 MR. RUSS: That's the reason --

5 THE COURT: And also you want to lay the
6 foundation for a subsequent ruling by the trial court.

7 MR. RUSS: That's the reason I'm asking,
8 Your Honor, because --

9 THE COURT: I'm not directing you how you
10 practice law here.

11 MR. RUSS: No, I understand that. I'm just
12 exploring the issue because the federal rules I
13 believe contemplate that under normal circumstances
14 one may object basically only to form and one has to
15 allow his witness to answer. But if -- if the
16 question strays into um other inappropriate areas um
17 --

18 THE COURT: Well, that's relevancy and
19 relevancy is not a grounds to direct the witness not
20 to answer, Mr. Russ.

21 MR. RUSS: Right. I understand that, Your
22 Honor. But you asked me --

23 THE COURT: Well, I'm glad you do now
24 because you didn't when you made your motion.

25 MR. RUSS: Um.

1 THE COURT: In all fairness.

2 MR. RUSS: Relevancy was one of the many
3 issues I attempted to raise as to the impropriety of
4 the question, um, not the only issue.

5 THE COURT: Which has been -- which is
6 contrary to the case law, Mr. Russ.

7 MR. RUSS: Okay. But the case law and the
8 rules also contemplate that a lawyer objecting can
9 only say objection to form, you may answer. But if a
10 question strays into one of these other areas like
11 30 --

12 THE COURT: Unless you want to waive the
13 objection, you don't -- you don't say anything.

14 MR. RUSS: No, but if I were to say, Your
15 Honor, for example, objection to form Rule 30D3A.

16 THE COURT: No. No, you don't do that. You
17 just object to form and you either state the grounds
18 there or as a courtesy to your opponent or you don't,
19 and in which case then you take your chances that
20 the -- the opponent will figure out for himself or
21 herself what the basis is and rephrase as Mr. Weisbeck
22 I'm sure in retrospect wishes he had on several of the
23 occasions that I just pointed out to him from having
24 read the record myself and determining which of his
25 questions were objectionable on any grounds.

1 But certainly, we're getting wrapped around
2 our axel here, Mr. Russ. The bottom line is that
3 there is no basis in the federal rules for an
4 instruction to a witness not to answer a question
5 except for the purpose of enforcing a valid privilege
6 or a prior court order limiting the scope of the
7 examination. Full stop.

8 MR. RUSS: We've been tangled around our
9 axel since yesterday at 11:15, Your Honor.

10 THE COURT: Well, I'm glad to be a
11 participant in the process of untangling it this
12 afternoon.

13 MR. RUSS: And I appreciate your efforts in
14 that regard. I would just be remised if I didn't say
15 um a lawyer defending a deposition under the federal
16 rules is caught in a bad spot because it's -- if he
17 objects by saying more than objection to form and he
18 starts to explain his objections, then the other side
19 says no speaking objections, you can't -- you can't
20 say that.

21 THE COURT: You can't coach and that's what
22 my -- that's what my guidelines focus in on. No
23 coaching.

24 MR. RUSS: But asserting an objection on a
25 federal rules basis or a privilege basis or another

1 appropriate basis sometimes necessitates saying more
2 than objection to form, and that's where I'm caught.

3 THE COURT: Such as? Give me an example.

4 MR. RUSS: Um, if -- if the -- if the
5 question is designed, for example, to inquire into
6 privileged conversations or privileged communications.

7 THE COURT: Well, then you -- then you
8 object based on privilege and you preserve your
9 objection, and if the opponent persists, then you --
10 you adjourn the deposition and come to court for a
11 ruling.

12 MR. RUSS: Okay. So um, just because I'm a
13 little slow and my axel is still a little tangled,
14 what the Court seems to be suggesting is that minimal
15 explanation be provided for certain objections but not
16 full-fledged argument.

17 THE COURT: No. I'm not telling you how to
18 practice law at all. I'm just giving you examples
19 based on my experience of dealing with these issues
20 occasionally, thank gosh, very occasionally we have to
21 deal with one and here we are in this -- at this stage
22 of my career dealing with an issue, and no, I'm not
23 going to tell you what to do here, Mr. Russ. You do
24 your homework and you figure it out for yourself what
25 you -- how you want to practice law. I'm just

1 pointing out what the cases say to me and the
2 commentators about the case law under Rule 30, that
3 the better practice is to give your opponent an
4 opportunity to make the correction and also lay the
5 foundation for a successful objection before the trial
6 shows up in court, and that's it. I'm not -- not in
7 the business of telling people how to conduct
8 themselves.

9 I only -- I only -- I guess it's like, you
10 know, somebody once said about something that they
11 know it when they see it. Same thing here. I mean,
12 when there's harassment that goes to oppression and
13 triggers a -- a right under Rule 30 um D3, I -- a
14 judge knows it when he or she sees it, and I don't see
15 it here. I haven't seen it from the get go. I tried
16 to see it, but I couldn't, Mr. Russ. I've read the
17 papers, considered the arguments, and for the reasons
18 discussed on the record, the plaintiff's motion is
19 granted. The defendant's motion is denied. And
20 you're not seeking sanctions here; are you, Mr.
21 Weisbeck?

22 MR. WEISBECK: No. Of course not, Your
23 Honor.

24 THE COURT: Well -- and that's it. And if
25 you want a record of the transcript, you're free to

1 order it and take an appeal within ten days. So now,
2 as far as resuming the deposition is concerned, I saw
3 some language in your papers that you were not
4 agreeing to bring the -- Mr. McCabe back for a further
5 completion of the deposition.

6 MR. RUSS: No. That's not correct, Your
7 Honor. I'm -- I understand the Court's ruling and
8 certainly I'll bring him back.

9 THE COURT: Okay.

10 MR. RUSS: Um, what I was concerned about
11 was that we had three depositions scheduled for this.

12 THE COURT: Well, that's why we're having
13 the argument today because I didn't want to blow up
14 the schedule that you had agreed upon, and knowing
15 these officers are busy and difficult to line up from
16 experience, I thought, well, let's -- let's give it an
17 expedited determination in which I have tried to do
18 this afternoon.

19 MR. WEISBECK: Thank you, Your Honor. We
20 appreciate that.

21 THE COURT: So you're going to go forward
22 with the depositions for the rest of the week and
23 bring back --

24 MR. WEISBECK: Well, I was going to talk
25 with Mr. Russ about it because we want to finish Mr.

1 McCabe first. We had a very um -- there's certain
2 reasons.

3 THE COURT: So you've got to reschedule them
4 anyway.

5 MR. WEISBECK: Him first. Now, he --

6 THE COURT: Well, you can't because you have
7 one tomorrow and then one later in the week.

8 MR. WEISBECK: Right. I was going to ask
9 Mr. Russ if we could move McCabe until tomorrow, the
10 next guy to Thursday -- or to Friday so that we can
11 continue on.

12 THE COURT: Well, you -- you try to work it
13 out the best you can. Don't -- try to avoid getting
14 me involved; okay?

15 MR. WEISBECK: We will try, Your Honor.
16 Thank you.

17 THE COURT: All right. So anything further
18 for the plaintiffs, Mr. --

19 MR. WEISBECK: No, Your Honor.

20 THE COURT: -- Weisbeck? Ms. Wischerath?

21 MS. WISCHERATH: No, thank you.

22 THE COURT: For the defendants, Mr. Russ?

23 MR. RUSS: No, Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. RUSS: And I do appreciate the Court's

1 expediting this process.

2 THE COURT: Well, that's what we are here
3 for. All right. We are adjourned.

4 (Proceeding concluded at 4:54 p.m.)
5
6

7 **CERTIFICATE OF COURT REPORTER**

8
9 I certify that this is a true and accurate
10 record of proceedings in the United States District
11 Court for the Western District of New York before the
12 Honorable Leslie G. Foschio on February 14, 2023.
13

14 S/ Brandi A. Wilkins

15 Brandi A. Wilkins

16 Official Court Reporter
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